Supreme Court, U.S.
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No. 99-562

IN THE
SUPREME COURT OF THE UNITED STATES

Joel Cunigan, Mark Wiles, Asst. Chief Wayne Green, Sam Manley, John Telek, Richmond Police Department, The City of Richmond, Kentucky,

Petitioners,

v.

Ali Shamaeizadeh, M.D.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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STATEMENT OF THE CASE

Petitioner accepts the additional facts, regarding the criminal prosecution of Respondent, recited in the "Statement of the Case" contained in Respondent's Brief in Opposition to the Petition for Writ of Certiorari. Petitioner clarifies, however, that while state criminal charges were brought against various Defendants and subsequently dismissed in state court, Respondent was not one of those "Defendants" as he was never arrested on state criminal charges nor prosecuted in state court proceedings. While Respondent's "Statement of the Case" does not clearly recite this, Respondent's Opposition Brief admits it in the statement: "Respondent was not a state-prosecuted individual but instead was indicted in federal court." Opp. 4. With respect to the facts in this case, therefore, the parties are in full agreement.

REASONS FOR GRANTING THE PETITION

Respondent's Opposition Brief attempts to gloss over the confusion that Heck v. Humphrey, 512 U.S. 477 (1994) has created and continues to create in the lower courts. Respondent misunderstands the nature of the first question presented in the Petition. Furthermore, while Respondent admits that a split in the circuit courts of appeals exists as to the second question presented, Respondent fails to recognize the intolerable situation that will exist if that split continues.

I. THE RULE IN HECK DOES NOT PROPERLY APPLY UNLESS THE PLAINTIFF HAS BEEN CONVICTED AND INCARCERATED SUCH THAT HABEAS CORPUS IS IMPLICATED.

Respondent's first argument for denying certiorari is that there are no splits in the circuit courts of appeals with regard to applying Heck to Bivens actions for exonerated defendants of

federal prosecutions. Opp. 2-3, citing Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Respondent's argument, however, misunderstands the first question presented in the Petition for Writ of Certiorari.

The Heck majority and concurring opinions all recite that the rule established in Heck stems from the fact that the case "lies at the intersection" of the Civil Rights Act of 1871, 42 U.S.C. §1983, and the federal habeas corpus statute, 28 U.S.C. §2254. Heck, 512 U.S. at 480, 490 & 491 (Scalia, J., majority opinion) (Thomas, J., concurring) (Souter, J., concurring). The latter of these statutes, §2254, expressly grants persons held in 'state custody' the right to seek a writ of habeas corpus in federal court against state authorities, but only after exhaustion of available remedies.

While it is true that many circuit courts of appeals have applied the Heck rule in Bivens actions, this Petition does not concern whether Heck should or should not be applied in such actions for the simple reason that no federal officials have been sued in this case on any Bivens claim. This is a *§1983* action brought against a municipality and certain of its police officers, all of whom were acting under the color of *state* law. Accordingly, no issue is presented in this case as to whether Heck should apply equally as between Bivens claims and §1983 claims as Respondent apparently believes. Rather, the issue in this case is whether the rule in Heck should be extended to a situation where the criminally accused (Respondent) was never convicted or incarcerated and thus never had habeas remedies available to him.

The first question presented in the Petition poses the issue as whether the favorable termination rule in Heck is properly applicable "when the §1983 plaintiff was never convicted nor held in 'state custody' within the meaning of 28 U.S.C. §2254." The question is so phrased because Respondent was, in fact,

never arrested by any state authority nor held in state custody on any state criminal charges arising out of the search of his premises. This is important if the rationale for the Heck rule is solely to avoid collisions at the intersection of §1983 and §2254 as stated in Justice Souter's Heck concurrence, as stated in the concurring and dissenting opinions in Spencer v. Kemna, 523 U.S. 1, ___, 118 S. Ct. 978, 988 & 990 (1998) (Souter, J. concurring, joined by Justices O'Connor, Ginsburg, and Breyer) (Ginsburg, J., concurring) (Stevens, J., dissenting), and as applied in the lower court decisions that follow the narrow view of Heck. This distinction may be less important if Heck is interpreted broadly in accordance with the Heck majority opinion and those lower court decisions that follow the broad view of Heck.[1]

Respondent, therefore, misconstrues the first question presented in the Petition. There is, indeed, a serious conflict as to how to interpret Heck. The lower courts are hopelessly split as to whether Heck should be applied broadly in accordance with the majority's rationale in Heck or narrowly in accordance with Justice Souter's Heck concurrence. The District Court below properly construed Heck narrowly so as to refuse to apply it to a §1983 plaintiff (Respondent) who has never been

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[1] In footnote 1 of the Petition, several decisions applying Heck to Bivens actions are cited. These citations illustrate one facet of the broad view of Heck. If Heck is interpreted narrowly, applicable only to cases at the "intersection" of §1983 and §2254, then cases applying Heck to federal prisoners alleging Bivens claims must be deemed an extension of the Heck rule since federally convicted prisoners are not held in 'state custody,' and thus are not subject to §2254's exhaustion requirement. Nothing in the Petition suggests that Heck's favorable termination rule, which is properly applicable to a convicted *state* prisoner's §1983 claim, should be inapplicable to a convicted *federal* prisoner's Bivens claim. To the extent Respondent believes the Petition makes such a suggestion, Respondent misses the issue.

tried or convicted, nor held in state custody so as to implicate habeas corpus. Under the narrow view of Heck--which applies Heck only to convicted inmates who have no available habeas remedy--the decision of the Sixth Circuit Court of Appeals below is clearly in error.

This Court must grant certiorari to resolve the lower courts' conflicting interpretations of Heck. The proper interpretation of Heck can only be clarified by this Court because the concurring and dissenting opinions in Spencer collectively suggest that Heck should be deemed inapplicable when no habeas remedy is available to the §1983 plaintiff. As pointed out in the Petition, numerous circuit decisions have noted the concurring and dissenting opinions in Spencer, but no circuit decision can resolve the conflict as to how narrowly or broadly the Heck rule should be applied.

Continuing uncertainty as to the proper interpretation of Heck is untenable since the favorable termination rule Heck establishes directly affects when a §1983 cause of action accrues and thus when the applicable period of limitations begins to run. Furthermore, the need for the lower courts to be uniform in their decisions regarding the commencement of limitations provides compelling reason to grant certiorari. Cf. Wilson v. Garcia, 471 U.S. 261, 266 (1985) (lower court confusion and uncertainty in applying limitations for §1983 claims provides "compelling reasons for granting certiorari"). This Court should, therefore, grant certiorari on the first question presented in the Petition.

II. THE ADMITTED SPLIT BETWEEN THE CIRCUIT COURTS OF APPEALS REGARDING HOW TO APPLY HECK MUST NOT BE ALLOWED TO CONTINUE.

Respondent admits in his Opposition Brief that a direct split in the circuit courts of appeals exists regarding the second question presented in the Petition. Opp. 4. Respondent claims, however, that this admitted split exists only between the Seventh Circuit Courts of Appeals and all other circuits. Respondent cites several slip opinions from several of the circuits with dates from 1997 and 1998 in support of this argument, but given the age of these slip opinions, it would appear the decisions were never published. They should not, therefore, negate Petitioner's analysis of the circuit split.

The Petition shows, from citations to published decisions, that the Seventh, Eighth, Ninth and Eleventh Circuit Courts of Appeals follow a similar approach in their application of Heck's footnote 7, but that the Sixth, Second and Fifth Circuits follow a different approach. The Sixth Circuit's opinion below reveals a similar count in the circuit split except that the opinion below fails to include the Ninth Circuit as aligned with the Seventh. Compare Pet. App. 8a-9a and cases cited therein with Pet. 18-28 and cases cited therein.

Regardless of how the circuit decisions are counted with respect to the split, Respondent and Petitioner agree completely that the Sixth and Seventh Circuits have diametrically opposed interpretations of Heck footnote 7. See Opp. 4 ("[t]he Seventh Circuit...is admittedly different"). Respondent trivializes this difference, however, and in effect, asks this Court to ignore it. Respondent claims that the Seventh Circuit's approach is "to allow all Fourth Amendment lawsuits to be filed but then abstains from them under Younger v. Harris, 401 U.S. 37 (1971)." Opp. 4, citing Simpson v. Rowan, 73 F.3d 134 (7th Cir. 1995). Respondent goes on to express that "the purposes

of Heck are being applied in all circuits including the Seventh....[, but t]here is no reason that [Respondent] should have his claim derailed...just to straighten out any problem this Court might have with the Seventh Circuit Court of Appeals." Opp. 4-5.

Respondent's argument fails to recognize that the split which he would have this Court ignore makes the difference in whether his §1983 claim is deemed to accrue on the date Petitioners allegedly committed their unconstitutional conduct or at some later time when criminal proceedings against him were finally concluded. This difference--which flows directly from the difference between the Seventh and Sixth Circuits applications of Heck-- is outcome determinative in this case (the same as it would be in innumerable similar cases). Under the Seventh Circuit's approach, there is no question but that Respondent's illegal search claim accrued immediately when he knew or should have known the search occurred. Under the Sixth Circuit's approach, his claim never accrued until his criminal prosecution concluded and thus his claim was saved from being time-barred.

Respondent seems to argue that because he was not state-prosecuted but rather federally prosecuted, this case is an inappropriate vehicle to resolve the admitted conflict between the circuits as to the proper application of Heck in illegal search cases. See Opp. 4. Nothing, however, could be further from the truth. The facts in this case squarely present the issue on which the split in the circuits exists. Indeed, it is precisely because no state prosecution ever occurred against Respondent that this case presents a *clean* set of facts upon which to resolve whether Heck is properly applicable in situations where there has been no 'state custody' within the meaning of 28 U.S.C. §2254 (i.e., the first question presented in the Petition).

Furthermore, no reason exists to deny certiorari merely because the Seventh Circuit may abstain from entertaining some §1983 claims (pursuant to Younger or some other

abstention doctrine). The issue in this case is not whether or when the courts should abstain from hearing §1983 claims *after* they are timely filed, but rather when courts should fix the accrual date for such claims to determine *if* they are timely filed (within applicable limitations). Moreover, any issue as to whether Younger abstention would have been applicable to Respondent's §1983 claim (had it been timely filed) has no bearing in this case precisely because Respondent was never state-prosecuted. Thus, the second question presented in the Petition, whether search and seizure claims represent an exception to the favorable termination rule of Heck, could not be more *cleanly* framed focusing solely on the accrual issue with no extraneous or complicating facts.

Finally, Respondent's suggestion to simply allow the split to continue ignores the wholly intolerable situation that will abide should certiorari be denied. A dispute in the circuits as to when to fix the accrual date for §1983 unlawful search and seizure claims is not an insignificant matter. Section 1983 has been characterized as an "important [and] ubiquitous" civil rights statute (Wilson, 471 U.S. at 266) and one of the "most fertile sources of federal-court" litigation (Heck, 512 U.S. at 480); moreover, illegal search and seizure claims represent a significant portion of that litigation. Consequently, a continuation of the split in the circuits will only prolong an intolerable confusion and uncertainty among the lower courts and legal community.

No better example of such intolerable confusion can be found than the case of Day v. Zubel, 922 P.2d 536 (Nev. 1996). Day is a legal malpractice action brought because of a lawyer's incorrect prediction as to when his client's §1983 claim accrued and thus when the period of limitations commenced and later expired. The reason the lawyer miscalculated the period of limitations was apparently because the lawyer was uncertain how long Heck's favorable termination rule delayed the accrual

of his client's claim. Members of the bar should not be faced with the threat of such malpractice actions anymore than lower courts' dockets should be clogged by the filing of such actions. Certainty in the determination of the accrual of §1983 claims would obviate such actions, and is therefore an absolute necessity in this area of the law.

This Court has previously observed with respect to §1983 time limitations: "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." Wilson, 471 U.S. at 266. This case presents just such a situation. Indeed, the issue in this case may be even more significant than the limitations issue presented in Wilson because determining the proper accrual date of a claim determines not just *when* the claim may be filed, but also *whether* the claim may be filed at all.

The split in the circuit courts of appeals as to when illegal search and seizure claims accrue is in need of immediate repair. There can no longer remain a lack of uniformity on this crucial issue. The Sixth and Seventh Circuits' admitted split on the issue has fully ripened and is irreconcilable. See Pet. 19-20, 29. The facts of this case, being undisputed, present this Heck accrual question squarely and cleanly. Accordingly, there exists no good reason not to grant certiorari in this case, and indeed, every reason exists why certiorari must be granted to resolve the lower courts' intolerable split concerning the second question presented in the Petition.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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